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No. .....

In The

Supreme Court of the United States

October Term, 1987

STATE OF MAINE,

Petitioner,

v.

EVENTS INTERNATIONAL, INC. and JAMES R. NORDMARK,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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October 9, 1987

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QUESTION PRESENTED

Does a Maine law which requires any charitable organization or charitable solicitor which uses less than 70% of each contribution for charitable program services to disclose how each contribution is to be used violate the First Amendment under the principles set forth by this Court in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)?

LIST OF PARTIES

The parties to the proceedings below were the petitioner State of Maine and the respondents Events International, Inc. and James R. Nordmark. The respondents before this Court include both Events International, Inc. and James R. Nordmark.

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The petitioner State of Maine respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Maine Supreme Judicial Court, entered in the above-entitled proceeding on July 16, 1987.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court is reported at 528 A.2d 458 and is reprinted in the appendix hereto, App. 8, *infra*.

The opinion of the Maine Superior Court has not been reported and is reprinted in the appendix hereto, App. 1, *infra*.

JURISDICTION

The judgment of the Maine Supreme Judicial Court, affirming the judgment of the Maine Superior Court, was entered on July 16, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

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STATUTE INVOLVED

9 M.R.S.A. § 5012 (1980).[1]

In 1977, the Maine Legislature enacted the Charitable Solicitations Act to comprehensively regulate the solicitation of funds for charities. 9 M.R.S.A. §§ 5001-5016 (1980 & Supp. 1986). Section 5012 of the Act requires charitable organizations and professional fundraisers to provide potential contributors with financial disclosures "at the time of solicitation." 9 M.R.S.A. § 5012 (1980). Specifically § 5012 requires a financial disclosure only when the charity

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[1] 9 M.R.S.A. § 5012 (1980) reads as follows:

> It shall be a violation of this chapter for a professional fund-raising counsel, professional solicitor, commercial coventurer or any other person to solicit contributions from a prospective donor in this State without fully disclosing to the prospective donor at the time of solicitation the estimated percentage of each dollar contributed which will be expended for program services, fund raising and management when less than 70% of the amount contributed will be expended for program services. In addition, any person required to register under section 5008, or any of his agents, who solicits contributions shall disclose to the prospective donor at the time of the solicitation the percentage of the gross contribution which will constitute his compensation and all fund-raising expenses connected with that particular contract.

or professional fundraiser estimates that less than 70% of each dollar contributed will be spent on charitable program services. When less than 70% is to be expended for program services, the charitable organization must make a three part disclosure and the professional fundraiser must make a four part disclosure. A charitable organization must disclose to each potential contributor the percentage of each dollar contributed which will be expended for (1) charitable program services, (2) management expenses of the charitable organization and, (3) fundraising expenses. The professional fundraiser must disclose the percentage of each dollar contributed which will be expended for (1) program services, (2) management expenses of the charitable organization, (3) fundraising expenses, and (4) the compensation of the professional fundraiser.

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STATEMENT OF THE CASE

Defendants Events International, Inc. (hereinafter referred to as Events International) and James R. Nordmark (the corporation's President and chief executive), whose offices are in Sarasota, Florida, own a circus and promote, organize, and conduct circuses as charitable fundraising ventures for service organizations such as Kiwanis, Lions, Jaycees, and Knights of Columbus. Events International's activities with respect to a particular fundraising event consist of two components. First, several weeks before the date of the circus, Events International sends an "engagement director" to the locality to organize and supervise a "boiler room" operation for the solicitation

of contributions over the telephone. Trial Transcript (hereinafter referred to as Tr.) 313-14. The engagement director hires personnel to telephone businesses and individuals in order to solicit contributions on behalf of the service organizations. Tr. 316. Frequently, the telephone solicitors inform donors that their donations will help send handicapped or disadvantaged children to the circus. Tr. 30-1, 78, 124, 160. Second, on the appointed day, Events International brings the circus to town and puts on a show at the arena or auditorium selected by the service organization.

Between April, 1982 and August, 1984 Events International conducted twenty fundraising drives within the State for a wide variety of service organizations. Joint Stipulation A.[2] Events International reported total contributions of over $450,000 for these twenty solicitations, of which a total of $61,475.00—or 13.6%—was turned over to the service organizations for their charitable purposes. The success of each particular fundraising drive varied significantly. For example, the fundraising drive conducted on behalf of the Waterville Lions Club in April, 1982 raised a total amount of contributions of just under $5,000, while the drive conducted on behalf of the South Portland Lions Club in April, 1983 raised a total of over $36,000. Similarly, the amount paid to the service organizations for their charitable programs ranged from zero dollars paid to the Lewiston Lions Club in August, 1984

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[2] Joint Stipulation A is a document admitted at trial and stipulated to by all parties which lists financial information for each fundraising drive conducted by Events International in Maine.

to $7,050 paid to the South Portland Lions Club in April, 1983. Joint Stipulation A.

Defendants failed to provide the financial disclosures required by 9 M.R.S.A. § 5012 at any point during the twenty solicitations which Defendants conducted in the State of Maine from February, 1982 through the summer of 1984. Tr. 13-4, 31, 44, 53-4, 57, 70, 78, 87-8, 103, 105-07, 116, 124, 148-9, 160, 170-71, 181-82, 183-84. For each of the twenty solicitations which are the subject of this litigation, the Defendants turned over far less than 70% of the proceeds to the charitable organizations for program services. As an examination of Joint Stipulation A reveals, Defendants turned over an average of only 13.6% of each dollar contributed to the charitable organization for program services. Joint Stipulation A.

These proceedings commenced on July 14, 1983, when the Attorney General filed a Complaint and Request for Temporary Restraining Order for violation of the Charitable Solicitations Act and for due application of funds given to public charities. On July 15, 1983, the Superior Court issued a Temporary Restraining Order. On August 17, 1984, the Attorney General sought and obtained a second Temporary Restraining Order, alleging continued violations of the disclosure requirements of § 5012.

The State's Second Amended Complaint, filed on August 5, 1985, sets forth two causes of action. The first cause of action alleged that between February 15, 1982, and August 7, 1984, the Defendants consistently failed to provide the required disclosures to prospective contributors in violation of the Charitable Solicitations Act and the

Unfair Trade Practices Act.[3] The second cause of action alleged that the Defendants breached their fiduciary relationship and obligation to public charities and prospective donors.[4]

On May 5, 6, and 7, 1986, a non-jury trial was held in this case before the Superior Court. The State presented twenty witnesses and the Defendants presented seven witnesses. In addition, the deposition testimony of four witnesses (three for the State and one for the Defendants) was introduced by joint stipulation as the trial testimony of those witnesses. On June 12, 1986, the Superior Court issued its Decision and Order declaring the Charitable Solicitations Act constitutionally defective and ordering judgment for the Defendants. App. 1, *infra.* Specifically, the Superior Court concluded that the mandatory disclosure provision of the Act, 9 M.R.S.A. § 5012 (1980), impermissibly infringed upon First Amendment rights and was unconstitutionally vague. App. 6-7, *infra.* On June 30, 1986, the State of Maine appealed from the decision of the Superior Court to the Supreme Judicial Court.

On July 16, 1987, the Maine Supreme Judicial Court affirmed the judgment of the Superior Court in a unanimous decision. 528 A.2d 458 (Me. 1987). App. 8, *infra.*

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[3] Pursuant to 9 M.R.S.A. § 5012 (1980) any violation of the Charitable Solicitations Act is a violation of the Unfair Trade Practices Act, 5 M.R.S.A. §§ 206-214 (1979 & Supp. 1986).

[4] Pursuant to his common law powers and the authority conferred by 5 M.R.S.A. § 194 (1979), the Attorney General sought injunctive relief and imposition of a constructive trust on the proceeds of the solicitation. This second cause of action is not involved in this Petition for Writ of Certiorari.

The Supreme Judicial Court, however, unlike the Superior Court, relied entirely upon a conclusion that 9 M.R.S.A. § 5012 was unconstitutionally overbroad and did not reach the question of whether the statute was void for vagueness.

The Supreme Judicial Court acknowledged the State's argument that § 5012 furthered two compelling governmental interests: "the prevention of fraudulent solicitations and the provision of information to prospective donors so that they understand how effectively their donations will serve the charitable purposes of organizations soliciting funds." 528 A.2d 458, 461. App. 14, *infra*. Relying on this Court's decisions in *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) and *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the Law Court held the "70% triggering device for . . . disclosures" did not further those two compelling interests and, as a consequence, "unnecessarily intrude[d] upon rights protected by the First Amendment." 528 A.2d 458, 461-62. App. 14, *infra*. Specifically, the Law Court noted that new charities and charities involved in the dissemination of information and advocacy of public issues ("the very organizations most deserving of First Amendment protections") are likely to have high fundraising costs. 528 A.2d 458, 462. App. 15, *infra*. The Law Court, concluding that these high fundraising costs did not indicate any inefficiency on the part of the charitable organziation, held as follows:

> This lack of logical congruency between the statute's design and the state's interest that it seeks to further makes inescapable the conclusion that the statute, in all of its applications, is an unacceptable and unnecessary intrusion upon First Amendment rights.

Id. App. 16, *infra*.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD DECIDE AN IMPORTANT QUESTION WHICH WAS LEFT UNRESOLVED IN TWO RECENT DECISIONS: WHETHER STATES CAN REGULATE CHARITABLE SOLICITATIONS BY REQUIRING CHARITIES AND PROFESSIONAL SOLICITORS TO MAKE FINANCIAL DISCLOSURES TO POTENTIAL CONTRIBUTORS.

This Court, in *Munson* and *Village of Schaumburg*, held that state and local government cannot *prohibit* solicitations by or on behalf of organizations which devote less than 75% of each dollar contributed to charitable program services. In overturning state and local legislation prohibiting solicitations, this Court left unresolved the question of whether states could require charitable organizations and professional solicitors to make financial disclosures to potential contributors.

While disclosure statutes were not before it in either *Munson* or *Village of Schaumburg*, this Court suggested that states could require disclosures without abridging the First Amendment rights of charitable organizations. Specifically, this Court stated in *Village of Schaumburg*:

> The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. Fraudulent misrepresentations can be prohibited and the penal laws used to punish such conduct directly. . . . *Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. Such measures may help make contribution decisions more informed, while*

> *leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses.*

444 U.S. 620, 637-38 (emphasis added). In *Munson*, the Supreme Court referred explicitly to the language quoted above from *Schaumburg*.

> The Court [in *Village of Schaumburg*] noted, for instance, that the Village could punish fraud directly and *could require disclosure of the finances of a charitable organization so that a member of the public would make an informed decision about whether to contribute.*

467 U.S. 947, 961-62, n.9 (emphasis added).

Two other courts have addressed directly the issue presented in this Petition. The United States District Court for the District of Minnesota, citing *Munson* and *Village of Schaumburg*, has upheld the constitutionality of Minnesota's mandatory disclosure provisions against a First Amendment challenge. *Heritage Publishing Company v. Fishman*, 634 F.Supp. 1489, 1504-05 (D.Minn. 1986) ("This type of public disclosure [financial disclosures by professional solicitors and charities] was suggested by the Supreme Court in *Munson* and *Village of Schaumburg* as an appropriate way for a state to prevent fraud in charitable solicitations.")[5] On the other hand, the United States

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[5] State courts and lower federal courts, in cases which did not squarely raise the issue presented in this Petition, have indicated their approval of legislation which requires disclosures to potential contributors. *See International Society of Krishna Consciousness of Houston, Inc. v. City of Houston*, 689 F.2d 541, 547, 550 (5th Cir. 1982) ("The Supreme Court, however, in *Schaumburg* expressly approved the idea of disclosures as

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District Court for the Eastern District of North Carolina, while concluding that the state has "an interest in providing its citizens with as much information as possible concerning the amount of their contributions that actually reach the designated charity," has held North Carolina's mandatory disclosure provision unconstitutional because that provision was not "drawn with narrow specificity." *National Federation of the Blind of North Carolina, Inc. v. Riley*, 635 F.Supp. 256, 261 (E.D.N.C. 1986), *aff'd mem.*, 817 F.2d 102 (4th Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3171 (U.S. September 15, 1987) (No. 87-328).[6] At least sixteen states, in addition to Maine, have adopted mandatory disclosure provisions for charitable organiza-

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legitimate less intrusive measure than a direct prohibition of solicitation."); *People v. Knueppel*, 173 Cal. Rptr. 466, 469 (Cal. App. 1980) ("there are strong indications in [United States Supreme Court decisions] that the state exhausts its power to regulate for the purpose of preventing fraudulent charitable solicitations when it requires *disclosure to the public of the solicitor's purposes and proposed expenditures*, investigates and compares the solicitor's representations and his deeds, prohibits fraudulent misrepresentations and punishes them after the fact through the use of penal laws.") (emphasis added); *Planned Parenthood League v. Attorney General*, 391 Mass. 709, 716, 464 N.E.2d 55, 60-61 (Mass. 1984); and *People v. United Funding, Inc.*, 484 N.Y.S.2d 245 (N.Y. App. 1984) (upholding a New York statute which required disclosures of professional solicitors).

[6] The District Court's objections to the disclosure provisions of the North Carolina statute were based on the specific language of that statute. *National Federation of the Blind of North Carolina, Inc. v. Riley*, 635 F.Supp. 256, 261 (E.D.N.C. 1986). Because the North Carolina disclosure statute differs significantly from the Maine statute, the District Court's opinion in *Riley* is readily distinguishable.

tions or professional solicitors.[7] Many of these provisions were enacted subsequent to this Court's 1980 decision in *Village of Schaumburg*.[8]

In spite of the direction provided by this Court in *Munson* and *Village of Schaumburg*, the Maine Supreme Judicial Court has held that the mandatory disclosure provisions of the Maine Act cannot pass scrutiny under the First Amendment. This Court should grant the State of Maine's Petition for Writ of Certiorari in order to reach directly the issue left unresolved by *Munson* and *Village of Schaumburg:* whether states can regulate charitable solicitations by requiring disclosures to potential contributors and, if so, what type of disclosure statute is permissible.

The Maine Supreme Judicial Court applied the Supreme Court's decisions in *Munson* and *Village of Schaumburg* to a fundamentally different and far less intrusive statute than was at issue in those two decisions. The Maine statute does not, as did the provisions in *Munson* and *Vil-*

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[7] Ark. Stat. Ann. § 70-906.1(a) (Supp. 1985); Cal. Bus. & Prof. Code § 17510.3 (1987); Conn. Gen. Stat. § 21a-190f(e) (Supp. 1987); Fla. Stat. § 496.265 (Pamph. 1985); Ga. Code § 43-17-8 (1984); Ind. Code § 23-7-8-6 (Supp. 1987); La. Rev. Stat. Ann. § 1903-04 (Pamph. 1986); Md. Code Ann. art. 41, § 3-205 (1986); Mass. Gen. Law Ann. c. 68 § 35 (Supp. 1987); Minn. Stat. § 309.556 (1984); N.M. Stat. Ann. § 57-22-8 (Supp. 1985); N.Y. Executive Law § 174-b & § 174-c (McKinney Supp. 1987); N.C. Gen. Stat. § 131C-16.1 (Supp. 1985); Or. Rev. Stat. § 128.836 (1985); Va. Code § 57-55.1 & § 57-55.2 (1981) & (Supp. 1987); Wash. Rev. Code § 19.09.100 (Supp. 1986).

[8] For example, the following were enacted after 1980: Ark. Stat. Ann. § 70-906.1(a) (Supp. 1985); Fla. Stat. § 496.265 (Pamph. 1985); Ind. Code § 23-7-8-6 (Supp. 1987); La. Rev. Stat. Ann. § 1903-04 (Pamph. 1986); N.M. Stat. Ann. § 57-22-8 (Supp. 1985); N.C. Gen. Stat. § 131C-16.1 (Supp. 1985); Or. Rev. Stat § 128.836 (1985).

lage of Schaumburg, prohibit solicitations when less than 70% of each dollar contributed is used for charitable purposes. Rather, the Maine provision only requires disclosures to potential contributors when the 70% figure is not met; the Maine statute does *not* prohibit solicitations under any circumstances.

The Maine statute differs from the provisions at issue in *Munson* and *Village of Schaumburg* in yet another fundamental way. The compelling state interest supporting Maine's disclosure provision is broader than the compelling interest supporting the provisions at issue in *Munson* or *Village of Schaumburg*. The prohibitions on solicitations at issue in those two cases were designed to identify and prohibit fraudulent solicitations. 467 U.S. 947, 966; 444 U.S. 620, 636. The mandatory disclosure provision of the Maine law, while also serving the purpose of identifying fraudulent solicitations, is primarily designed to serve another purpose: the dissemination of information to potential donors so that those donors can choose intelligently between the claims of competing charities.[9]

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[9] The legislative debate on the Charitable Solicitations Act is notable for the consistency with which proponents of the Act voiced their approval of the goal of informing the public as to how their donated dollars would be used. Representative Trafton, a co-sponsor of L.D. 1736 (108th Legis. 1977), succinctly described the purpose of the bill:

> If I had to sum up this bill, I think I would say that it is a *right to know approach*, an informational approach.

Me. Legis. Rec. 2200 (1977) (emphasis added). The other co-sponsor of L.D. 1736, Representative Palmer, also stressed the importance of disclosures:

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The Supreme Court in *Munson* and *Village of Schaumburg* concluded that there was no nexus between high fundraising costs and fraud. 467 U.S. 947, 966-68; 444 U.S. 620, 636-37. Accordingly, the Supreme Court held that the legislative provisions at issue were not narrowly tailored to serve the compelling state interest of identifying and prohibiting fraud.

The Maine Supreme Judicial Court, extending the holdings in *Munson* and *Village of Schaumburg* from statutes which prohibit solicitation to a statute which only requires disclosure, concluded that no nexus exists between high fundraising costs and the efficiency or cost effectiveness of a particular solicitation. 528 A.2d 458, 461-62. App. 14-16, *infra*. Specifically, the court identified a number of situations in which charities might have high fundraising costs but, in the court's view, would not be "any less efficient in furthering their causes": new charities

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> [T]he real heart of this bill is that it is about time that those who are being requested all the time for gifts for charities in this state know what percentage of the dollar they give goes to the charity and what percentage goes to the fundraiser.

Me. Legis. Rec. 2201 (1977). *See also* Me. Legis. Rec. 2118 (statement of Sen. Pierce: ". . . L.D. 1736 does not seek to prohibit any fund-raising activity, no matter how high the cost of solicitation, but rather it attempts to inform the public so that they may make a wise decision with regard to their dollar . . . ."); 2201 (statement of Rep. Tierney: "the public does have a right to know, the people who are going to give have a right to know . . . ."); 2234 (statement of Sen. Conley: "I think what it does primarily is what most of us are concerned with. We would like to know exactly how all of the money is being spent, how much of it is staying in the State, and how much is being spent on administrative costs, and how much of it is actually going to help charity.")

which have high startup expenses, charities serving "unpopular causes," charities sponsoring "very costly fundraising events," and charities engaged in the "advocacy of public issues" (charities which, according to the court, are "most deserving of First Amendment protections" and which, by "the very nature of their activities," have high fundraising costs). 528 A.2d 456, 462; App. 15-16, *infra*. Accordingly, the court held that mandatory disclosure did not further the State's interests and "makes inescapable the conclusion that the statute, in all of its applications, is an unacceptable and unnecessary intrusion upon First Amendment rights." 528 A.2d 456, 462; App. 16, *infra*.

Contrary to the conclusions reached by the Maine court, a nexus does exist between the high fundraising costs and the efficiency of particular solicitations. The Maine disclosure statute, in essence, attempts to improve the operation of the marketplace for the solicitation of funds by providing all potential contributors with basic financial information about the charitable organization's solicitation drive.[10] The fact that disclosure of how each contribu-

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[10] The legislative debate on the Charitable Solicitations Act, in fact, focused on the problems created by the competition between charities for scarce dollars. Representative Trafton, a co-sponsor of the Charitable Solicitations Act, commented on the importance of disclosures in such a competitive environment:

> The reason these charities support this bill is because they realize that when dollars are short, it is very important that the public be informed as to how they are being spent, so that they can make a very wise choice in their giving.

Me. Legis. Rec. 2201 (1977). Senator Pierce expressed these same concerns:

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tion will be expended *may* reduce the contributions given to public advocacy groups or other charities which have high fundraising costs while increasing the contributions given to charities which have lower fundraising costs does not raise an issue under the First Amendment. The First Amendment does not shield charities including public advocacy organizations, from having to compete in the marketplace for solicitation of funds.

Section 5012 does not infringe upon the rights of public advocacy groups; rather, § 5012 only provides potential contributors with sufficient information with which to evaluate the competing claims of charitable organizations (public advocacy groups and more traditional charitable organizations alike) for the scarce dollars of the potential contributors. The Supreme Judicial Court's broad reasoning effectively bars the Maine Legislature from enacting any mandatory disclosure provision, regardless whether the provision applies to all charitable solicitations or only to solicitations which yield less than a particular percentage for charitable program services. This Court should grant the State of Maine's Petition for Writ of Certiorari in order to make clear that the State of Maine,

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> [T]here is only so much money out there to go around for charities, and it is getting pretty thin. You know and I know that we are all solicited time and time again, and it is about time we . . . have disclosure from these organizations, and how effective a job they are doing, so that we can pick and choose the ones which we feel are doing the best to get the people to actually help them, and not going to the direction of the ridiculously high administrative costs in matters like this.

Me. Legis. Rec. 2234 (1977).

as well as the many other states which have enacted mandatory disclosure provisions, can require charitable organizations and professional solicitors, consistent with this Court's decisions in *Munson* and *Village of Schaumburg*, to disclose how each contributed dollar will be spent.

CONCLUSION

For the reasons set forth above, the State of Maine's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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October 9, 1987

APPENDIX

STATE OF MAINE
KENNEBEC, ss.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-83-336

STATE OF MAINE,

Plaintiff

vs.

DECISION and ORDER

EVENTS INTERNATIONAL, INC.,
ET AL.,

Defendants

This matter is before the Court on the Plaintiff State of Maine's Complaint which seeks to permanently enjoin the Defendants from violating the disclosure provision of the Charitable Solicitations Act, 9 M.R.S.A. § 5012,[1] a violation of which constitutes an unfair trade practice pursuant to 9 M.R.S.A. § 5014. Plaintiff also seeks imposition of a constructive trust on 70% of Events Inter-

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[1] 9 M.R.S.A. § 5012:

> It shall be a violation of this chapter for a professional fund-raising counsel, professional solicitor, commercial co-venturer or any other person to solicit contributions from a prospective donor in this State without fully disclosing to the prospective donor at the time of solicitation the estimated percentage of each dollar contributed which will be expended for program services, fund raising and management when less than 70% of the amount contributed will be expended for program services. In addition, any person required to register under section 5008, or any of his agents, who solicits contributions shall disclose to the prospective donor at the time of the solicitation the percentage of the gross contribution which will constitute his compensation and all fund-raising expenses connected with that particular contract.

national's net proceeds received over a three year period. A trial on the merits was held on May 5, 1986 through May 7, 1986. A substantial number of witnesses testified at trial and the issues were fully briefed and argued.

The facts and history of this action are fully set forth in the Order of this Court dated January 26, 1984 denying the Defendants' Motion for Summary Judgment and need not be reiterated here.

I.

At trial, the parties raised and presented evidence on the following issues:

1. Whether 9 M.R.S.A. § 5012 violates the First and Fourteenth Amendments to the U.S. Constitution.

   a. Whether the disclosure requirements of § 5012 are the least intrusive means of protecting the public from fraud.

   b. Whether in failing to take into consideration the costs of putting on special events, § 5012 disproportionately burdens small charities.

   c. Whether the disclosure requirement is imprecise and unconstitutionally vague.

2. Whether Defendants Events International and James Nordmark are legally responsible for the actions of engagement directors.

3. An issue not substantively addressed at trial but fully developed in the parties' briefs and properly before this Court for consideration is:

   If § 5012 is constitutional, whether the available remedies includes imposition of a constructive trust upon 70% of net proceeds.

II.

The penultimate issue to be decided by this Court is whether § 5012 of the Charitable Solicitation Act violates provisions of the United States Constitution. At the core of the Defendants' argument is the contention that § 5012 impermissibly infringes upon the Defendants' constitutionally protected right of free speech.

At trial, the Defendants attempted to establish that the charitable solicitation disclosure required by 9 M.R.S.A. § 5012 is unconstitutional on its face as violative of the First and Fourteenth Amendments. Defendants contend that the three part disclosure imposes a burden on free speech more substantial than that required to protect the government's legitimate interest in regulating the area of charitable solicitations. Specifically, it is urged that a statutory mandate to disclose information at the point of solicitation often creates incorrect assumptions on the part of the donor, thereby affecting the donor's willingness to contribute. Defendants claim that, as a result, the law operates to burden those who seek to comply with it and places them at a competitive disadvantage. Defendants argue that given the limited number of charitable dollars and the unlimited need for those dollars by numerous charitable organizations, the burden imposed by the three part disclosure requirement is especially detrimental to smaller charities which depend in part upon large special events for their fundraising efforts. In defense of the statute, the State contends that the Charitable Solicitation Act imposes reasonable regulations on the appeal for charitable funds.

It is well-established that charitable solicitation activities are entitled to the protections of the free speech

provision of the state and federal constitutions. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980); *State v. Maine State Troopers Assoc.*, 491 A.2d 538 (Me. 1985). Because the Charitable Solicitation Act's disclosure requirements operate to burden a charitable organization's fundamental rights, the State must demonstrate that the law can withstand strict judicial scrutiny. *Dunn v. Blumenstein*, 405 U.S. 330, 336 (1972). In order for § 5012 to survive strict scrutiny, the State must show that the law is necessary to promote a compelling government interest, and that "[t]he law . . . is the least restrictive means of achieving the compelling government interest." *Village of Schaumburg* at 636, *State v. Maine State Troopers Assoc.* at 542.

In reviewing the history of the Charitable Solicitations Act, it is clear that the purpose of the Act is to prevent fraud in charitable solicitation. The disclosure provision of § 5012 is also intended to allow solicited individuals to make an informed choice in deciding whether or not to contribute to a particular charity or special event. It is without dispute that this is an area which is appropriate for reasonable legislative intrusion. However, as it relates to the First Amendment, any legislation in the area of charitable solicitation must impose the least restrictive impediment in order to balance the requirements of the First Amendment.

Here, the State imposes a very restrictive impediment on the exercise of free speech. The three part disclosure requirement is in and of itself restrictive and calculation of the percentage figures poses an insurmountable burden on many charitable organizations. Testimony at trial sup-

ported the Defendants' contention that an accurate calculation of the various percentage figures is extremely difficult in many situations and subject to a number of different methods and theories of calculation. As a result, an organization that makes a good faith attempt to comply with § 5012 could arrive at different percentage figures depending upon the accounting method utilized. The imprecision of the disclosure requirement renders it difficult to discern who is required to comply, when they are required to comply, and whether the law is being complied with correctly. Despite this difficulty presented by the statute, § 5012 carries with it a penalty for failure to disclose the percentages as well as for failure to disclose them correctly. After review of the evidence presented at trial, it appears clear that under all but the most ideal circumstances, the required percentages are determined by estimates rather than solid figures. The testimony of Defendants' expert witnesses fully supports the claim that in the absence of more precise guidelines, the allocation of expenses required by § 5012 is too complex and uncertain to rise beyond the level of a subjective and somewhat speculative determination.

The evidence also supports the claim that the disclosure of the percentage figures carries with it a substantial likelihood that the potential donor will be misled rather than informed by the disclosure. In effect, the goal of § 5012, to protect against fraud and to educate the potential donor, is not necessarily achieved by means of this reporting statute.

III.

The Court further finds that § 5012 is unconstitutionally vague.[2] In order for a statute to overcome a claim that it is impermissibly vague, the statute must "provide reasonable and intelligible standards to guide the future conduct of individuals" who must comply with the statute. *State v. Maine State Troopers Association,* 491 A.2d 538, 543 (Me. 1985). Based on the evidence and analysis discussed above, the Court is not persuaded that the standards set forth in § 5012 are reasonable or intelligible.

The Court is mindful that a disclosure requirement does not in every instance present a constitutional issue. However, the disclosure requirement must be reasonable. As the *Schaumburg* Court noted:

> "The Village may serve its legitimate interests; but it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with First Amendment freedoms. [citations omitted]. Broad prophylactic rules in the area of free expression are suspect. Precision of regulation must be the touchstone . . . *NAACP v. Button,* 371 U.S. 415, 438 (1963) . . . ." 444 U.S. at 637.

Section 5012 is not "narrowly drawn" nor is it an example of precise regulation of a delicate, constitutionally protected interest. This Court is persuaded that the three part disclosure requirement is unconstitutionally vague,

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[2]The State contends that the Defendants do not have standing to raise the vagueness issue on the ground that the Defendants have not argued that the statute is vague as applied to them. Throughout these proceedings, the Defendants argued that the vagueness of the law impacts on them by not imparting a clear understanding of what the law requires and how it is to be complied with. The Court determines that in raising these arguments the Defendants established proper standing to address the vagueness issue.

overbroad and burdensome, thereby rendering § 5012 void. The Legislature is free to enact new legislation to protect its citizens from fraud. In order to pass constitutional muster, however, any new legislation must impose the least intrusive method necessary to accomplish the avowed purpose underlying the Charitable Solicitations Act.

In view of the Court's decision on the First Amendment objections raised by the Defendants, it is unnecessary to reach the merits of the remaining issues raised by the parties.

Therefore, the Court ORDERS and the entry shall be:

Judgment for the Defendants

Dated: June 12, 1986

/s/ Morton A. Brody
Justice, Superior Court

STATE of Maine

v.

EVENTS INTERNATIONAL, INC., et al.

Supreme Judicial Court of Maine.

Argued Jan. 12, 1987.

Decided July 16, 1987.

* * *

Before McKUSICK, C.J., and ROBERTS,* WATHEN, GLASSMAN, SCOLNIK and CLIFFORD, JJ.

SCOLNIK, Justice.

The plaintiff, State of Maine, appeals from a judgment entered by the Superior Court, Kennebec County, in favor of the defendants, Events International, Inc. (Events), a professional fundraising corporation, and its president, James Nordmark. The State's action against the defendants was brought pursuant to 9 M.R.S.A. § 5012 (1980), which requires solicitors of funds for charitable organizations to disclose, at the time of solicitation, the financial allocations of contributions. Finding that section 5012 was unconstitutionally overbroad under the First Amendment to the United States Constitution and void for vagueness under the Fourteenth Amendment, the Superior Court, after a jury-waived trial, entered judgment for the defendants. For the reasons set forth herein, we affirm the judgment.

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* Roberts, J., sat at oral argument and participated in the initial conferences, but did not participate in the final decision.

I.

Events is a Florida-based, for-profit corporation that plans, promotes, and operates fundraising events for its clients. Between 1982 and 1984, Events entered into contracts with a variety of organizations in Maine to sponsor magic shows, circuses, and other events in order to raise money on their behalf.[1] It supervised individuals who promoted ticket sales for these fundraising events over the telephone. During these promotions, Events failed to disclose certain information concerning the allocation of contributions to potential ticket buyers.

In 1983, the State filed a complaint to enjoin Events from continuing to operate in Maine, alleging that its solicitations of charitable contributions through ticket sales violated the disclosure requirements of section 5012 of the Charitable Solicitations Act, 9 M.R.S.A. §§ 5001-5016 (1980 & Supp.1986).[2] After obtaining consecutive

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1. The organizations that hired Events duing this period were Lions Clubs, Kiwanis Clubs, and Jaycees from various Maine towns and cities, the Exchange Club of Auburn, the Lewiston-Auburn Optimist Club, Augusta Knights of Columbus, and Big Brothers/Big Sisters of Portland.

2. Section 5012 provides:

   Charitable solicitation disclosure

   It shall be a violation of this chapter for a professional fund-raising counsel, professional solicitor, commercial coventurer or any other person to solicit contributions from a prospective donor in this State without fully disclosing to the prospective donor at the time of solicitation the estimated percentage of each dollar contributed which will be expended for program services, fund raising and management when less than 70% of the amount contributed

(Continued on following page)

temporary restraining orders, the State filed an amended complaint in 1985 seeking to permanently enjoin Events from operating in Maine on the ground that its business activities constituted unfair trade practices.[3] The State

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> will be expended for program services. In addition, any person required to register under section 5008, or any of his agents, who solicits contributions shall disclose to the prospective donor at the time of the solicitation the percentage of the gross contribution which will constitute his compensation and all fund-raising expenses connected with that particular contract.

The Act defines "solicit and solicitation" as "any oral or written request, however communicated directly or indirectly, for any contribution." 9 M.R.S.A. § 5003(11) (1980). Solicitation is "deemed to have taken place when the request is made, whether or not the person making the solicitation receives any contribution in response." *Id.* "Contribution" means "the promise or grant of any money or property of any kind or value, including the payment or promise to pay in consideration of a sale, performance or event of any kind which is advertised in conjunction with the name of any charitable organization." 9 M.R.S.A. § 5003(4) (1980).

Events is a "commercial co-venturer" under the Act; that is, "any person who, for profit or other commercial consideration, shall conduct, promote, underwrite, arrange or sponsor a sale, performance or event of any kind which is advertised in conjunction with the name of any charitable organization." 9 M.R.S.A. § 5003(3) (1980). It is therefore required, under section 5008, to register annually with the Commissioner of Business Regulation and, if not previously bonded, to file a $10,000 bond. 9 M.R.S.A. § 5008 (Supp.1986). At all times pertinent to this litigation, Events was properly registered and bonded pursuant to section 5008.

3. Section 5014 of the Charitable Contributions Act provides:

> Violation as unfair trade practice
>
> Any violation of this chapter shall constitute a violation of Title 5, chapter 10, the Unfair Trade Practices Act.
>
> Any intentional violation of this chapter shall be a Class D crime.

also sought the imposition of a constructive trust on a portion of Events' net proceeds earned in Maine to be set aside for payment to the State or the organizations that had contracted with Events for fundraising. After a three day trial, the Superior Court entered judgment for the defendants. It held that the mandatory disclosure requirements of section 5012 were "unconstitutionally vague, overbroad and burdensome, thereby rendering § 5012 void." It is from that judgment that the State appeals.

II.

The defendants maintain that section 5012 is unconstitutional on its face because it is overbroad under the First Amendment and "void for vagueness" under the Fourteenth Amendment.[4] By mounting a "facial" challenge to section 5012, the defendants "claim that the law is 'invalid *in toto*—and therefore incapable of any valid application.'" *Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 n. 5, 102 S.Ct. 1186, 1191 n. 5, 71 L.Ed.2d 362 (1982) (quoting *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 39 L.Ed. 2d 505 (1974)). In assessing such a challenge, we are directed by the Supreme Court to first consider the overbreadth issue before turning to the question of whether the law is "void for vagueness." *See id.* at 1191; *CISPES v. F.B.I.*, 770 F.2d 468, 472 (5th Cir.1985).

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4. The defendants did not claim violations of the free speech or due process provisions of the Maine Constitution at trial or in their briefs. As a result, this issue is not preserved for appeal. *See State v. Thornton*, 485 A.2d 952 (Me.1984); *State v. Philbrick*, 481 A.2d 488, 493 (Me.1984); *State v. Desjardins*, 401 A.2d 165, 169 (Me.1979).

The United States Supreme Court has recognized that the solicitation of funds by charitable organizations is protected speech under the First Amendment. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980). Corporations, like Events, that are hired to solicit funds for charities, have standing to challenge the constitutional validity of statutes that interfere with charitable solicitations. *Secretary of State v. Joseph H. Munson Company, Inc.*, 467 U.S. 947, 959, 104 S.Ct. 2839, 2848, 81 L.Ed.2d 786 (1984).[5]

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5. The Supreme Court has stated that First Amendment protections extend to "commercial speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 758-59, 96 S.Ct. 1817, 1823-24, 48 L.Ed.2d 346 (1976). The Court, however, has not addressed the extent to which professional solicitors enjoy First Amendment protections when soliciting funds for charitable organizations. *See Munson*, 104 S.Ct. at 2846 n. 6. It is also unclear whether solicitations for contributions by "traditional charitable organizations" are as fully protected as solicitations by organizations involved in "information dissemination, discussion, and advocacy of public issues." *See Schaumburg*, 444 U.S. at 635-36, 100 S.Ct. at 835-36. Events can properly assert the First Amendment rights of the organizations in Maine with which it has contracted because the activity sought to be protected is at the heart of the business relationship between Events and its clients, and Events' "interests in challenging the statute are completely consistent with the First Amendment interests of the charities it represents." *Munson*, 104 S.Ct. at 2848 (plurality), 2856 (Stevens, J., concurring). In addition, although the organizations Events has dealt with in Maine are traditional charities or civic organizations rather than those involved in the dissemination or advocacy of ideas or public issues, *see supra* note 1, the statute clearly applies to the latter because "any person" that solicits funds for an "educational purpose," must comply with its provisions. *See* 9 M.R.S.A. §§ 5003(1), 5003(2), 5012 (1980 & Supp.1986). In *Munson*, the Court allowed a professional fundraiser to challenge, on First Amendment grounds, a statute regulating so-

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A statute is overbroad "if in its reach it prohibits constitutionally protected conduct." *State v. State of Maine Troopers Association*, 491 A.2d 538, 543 (Me. 1985) (citing *Grayned v. Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972)). To invalidate a statute on grounds that it is overbroad, however, challenging parties must generally show that the statute sweeps within its ambit a *substantial* amount of protected speech. *State v. State of Maine Troopers Association*, 491 A.2d at 543 (citing *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348, 3360, 73 L.Ed.2d 1113 (1982)).[6] "Substantial overbreadth" need not be shown, however, in a situation where a statute is unconstitutional on its face because it "does not employ means narrowly tailored to serve a compelling governmental interest" and directly restricts protected First Amendment activity "in all of its applications." *Munson*, 104 S.Ct. at 2852 n. 13. *See Schaumburg*, 444 U.S. at 637-39, 100 S.Ct. at 836-37. *See also Schultz v. Frisby*, 807 F.2d 1339, 1349 (7th Cir.1986) (applying "the *per se* type" of overbreadth analysis of *Munson*). We find section 5012 facially unconstitutional under this latter standard.

(Continued from previous page)

licitations, in part, because it found that the statute applied to educational institutions and organizations involved in the dissemination of ideas or advocacy of public issues. 104 S.Ct. at 2850-51 & n. 11.

6. The reason for that requirement is that a statute should not be found unconstitutional on its face "where, despite some possibly impermissible application, the remainder of the statute covers a whole range of easily identifiable and constitutionally proscribable conduct." *Munson*, 104 S.Ct. at 2851 (citations and quotations omitted).

The State argues that section 5012 furthers two "compelling" governmental interests: the prevention of fraudulent solicitations and the provision of information to prospective donors so that they understand how effectively their donations will serve the charitable purposes of organizations soliciting funds. It contends that the mandatory disclosures of section 5012 place a check on continued solicitations by organizations or corporations that fraudulently pocket contributions for purposes other than charitable causes and, at the same time, allow the public to assess the "efficiency" of charitable organizations.

The financial allocations specified in section 5012, need only be disclosed, however, when less than 70 percent of the amount contributed by a prospective donor will be expended for program services of the recipient organization.

Implicit in the statute's 70 percent triggering device for these disclosures is an assumption, on the part of the Legislature, that when less than 70 percent of a charitable contribution is allocated to the "program services" of a recipient charitable organization, the organization's "efficiency" and its purported charitable purpose are both suspect, and it should therefore be required to disclose its financial inner-workings to prospective contributors. Based on the Supreme Court's pronouncements concerning similar legislative assumptions and the evidence in this record, we conclude that these premises upon which section 5012 is predicated are untenable and, as a result, the statute, in all of its applications, unnecessarily intrudes upon rights protected by the First Amendment. It is on this basis, discussed in more detail below, that the statute should be struck down as unconstitutional. *See Munson*, 104 S.Ct. at 2853; *Schaumburg*, 444 U.S. at 637, 100 S.Ct.

at 836; *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786, 98 S.Ct. 1407, 1421, 55 L.Ed.2d 707 (1978).

Evidence presented at trial reveals that many charities operate below the 70 percent threshold during the early years when they are engaged in building a substantial donor base. Their financial allocations to "program services" may be low simply because they are just getting operations under way and attempting to fulfill a need that is unmet by other organizations. Charities or nonprofit groups may also expend more on fundraising or management costs relative to program services because they serve unpopular causes. In either case, it cannot be said that the organization is either fraudulent or less "efficient" in meeting charitable purposes than others with relatively low fundraising or management costs and consequently higher percentage allocations to program services.[7] *See Munson*, 104 S.Ct. at 2852-53 & n. 15 (charitable activities may require high costs but still serve charitable purposes or high costs may simply be result of charity's unpopularity); *Schaumburg*, 444 U.S. at 637 n. 10, 100 S.Ct. at 836 n. 10 ("The costs incurred by charitable organizations conducting fund-raising campaigns can vary dramatically depending upon a wide range of variables, many of which are beyond the control of the organization."). More importantly, however, the very organizations most deserving of First Amendment protections—those involved in the dissemination of information, discussion, and ad-

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7. The same may be said for organizations that sponsor very costly fundraising events where the percentage of gross contributions that they obtain for their "program services" appears small, but in absolute terms the amount is quite substantial.

vocacy of public issues, *see supra.* note 5,—are likely to have relatively high solicitation or fund-raising costs (and therefore lower percentages of donations allocated to program services), not because they are fraudulent or any less efficient in furthering their causes than other nonprofit or charitable organizations, but because the very nature of their activities cause those costs to be high. *Munson,* 104 S.Ct. at 2850-51; *Schaumburg,* 444 U.S. at 635, 100 S.Ct. at 835.

Given these fundamental flaws in the design and operation of section 5012, it is only fortuitous that, in some of its applications, this statute might accomplish the State's goals of preventing fraud and providing information to prospective donors about the effectiveness of their contributions in furthering charitable purposes. *See Munson,* 104 S.Ct. at 2852-53 (state's ability to prevent fraud through percentage limitation on amounts charity can spend on expenses in fundraising activity fortuitous at best); *see also Black United Fund of N.J. v. Kean,* 593 F.Supp. 1567, 1578 (D.N.J.1984). This lack of logical congruency between the statute's design and the State's interest that it seeks to further makes inescapable the conclusion that the statute, in all of its applications, is an unacceptable and unnecessary intrusion upon First Amendment rights. *See Munson,* 104 S.Ct. at 2852-53. As a result, it is unconstitutional on its face. *See id.; Schaumburg,* 444 U.S. at 637-39, 100 S.Ct. at 836-37.

The entry is:

Judgment affirmed.

All concurring.

(2)

No. 87-593

In the Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MAINE,
Petitioner,

vs.

EVENTS INTERNATIONAL, INC., and
JAMES R. NORDMARK,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

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16pp

QUESTION PRESENTED

May a state compel by statute, in connection with a charitable solicitation campaign, point-of-solicitation disclosure of estimated percentage figures requiring functionalized accounting and the prospective allocation of dollars among three to five categories, contingent upon whether the solicitor is a professional or volunteer, when all of the above is triggered by a 70% threshold?

LIST OF PARTIES

The parties to the proceedings below were the petitioner State of Maine and the respondents Events International, Inc. and James R. Nordmark. The respondents before this Court include both Events International, Inc. and James R. Nordmark.

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No. 87-593

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EVENTS INTERNATIONAL, INC., and
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Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MAINE SUPREME JUDICIAL COURT

The respondents, Events International, Inc. and James R. Nordmark, respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the decision of the Maine Supreme Judicial Court in this case.

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court decided July 16, 1987, affirming the judgment of the Superior Court of Kennebec County, Maine, is reported at 528 A.2d 458 and is printed in the Appendix to the Petition for Writ, App. 8.

The opinion of the Superior Court of Kennebec County, Maine, finding 9 M.R.S.A. § 5012 (1980) unconstitutional as violative of the First Amendment has not been reported and is printed in the Appendix to the Petition for Writ, App. 1.

STATUTE INVOLVED

9 M.R.S.A. § 5012 (1980) provides:

It shall be a violation of this chapter for a professional fund raising counsel, professional solicitor, commercial coventurer or any other person to solicit contributions from a prospective donor in this state without fully disclosing to the prospective donor at the time of solicitation the estimated percentage of each dollar contributed, which will be expended for program services, fund raising and management when less than 70% of the amount contributed will be expended for program services. In addition, any person required to register under § 5008, or any of his agents who solicits contributions, shall disclose to the prospective donor at the time of the solicitation the percentage of the gross contribution which will constitute his compensation, and all fund raising expenses connected with that particular contract.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO UNRESOLVED QUESTION

Petitioner, the State of Maine, has suggested that this case presents an important question left open by this Court's decisions in *Village of Schaumburg* and *Munson*, i.e. "whether states could require charitable organizations and professional solicitors to make financial disclosures to potential contributors." (Petition, p. 8) Untrue! This is precisely the means of regulation recommended by the Court in *Schaumburg*:

> Efforts to promote disclosure of the finances of charitable organizations also may assist in preventing fraud by informing the public of the ways in which their contributions will be employed. 444 U.S. 620 at 637, 638.[1]

Munson adopted by reference the *Schaumburg* approach, i.e. disclosure through registration:

> . . . The point of the *Schaumburg* Court's conclusion that the percentage limitation was not an accurate measure of fraud was that the charity's 'purpose' may include public education. It is no more fraudulent for a charity to pay a professional fund raiser to engage in legitimate public educational activity than it is for the charity to engage in that activity itself. And concerns about unscrupulous professional fund raisers, like concerns about fraudulent charities, can

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1. It is important to note the *Schaumburg* Court was implicitly recommending disclosure-on-request type statutes, not mandatory oral disclosure:

> Illinois law, for example, requires charitable organizations to register with the state attorney general's office and to report certain information about their structure and fund raising activities. Ill. Rev. Stat. Ch. 23, § 5102(a) (1977). *See* n.5, *supra*. 444 U.S. 620, 638, n.12.

Footnote 5 referred to in the above Footnote 12 reads:

> Illinois law requires '(e)very charitable organization . . . which solicits or intends to solicit contributions from persons in th(e) state by any means whatsoever' to file a registration statement with the Illinois attorney general. Ill. Rev. Stat. Ch. 23, § 5102(a) (1977). The registration statement must include a variety of information about the organization and its fund raising activities.
>
> Charitable organizations are required to 'maintain accurate and detailed books and records' which 'shall be open to inspection at all reasonable times by the attorney general or his duly authorized representative.' Section 5102(f). Registration statements filed with the attorney general are also open to public inspection. *Id.* 624, n.5.

> and are accommodated directly, through disclosure and registration requirements and penalties for fraudulent conduct. 467 U.S. 947 at 973, n.16.

Though petitioner may attempt to frame the issue in terms of the disclosure question, it is not the issue properly presented by the case at bar. The finding of overbreadth by the Main Supreme Judicial Court was grounded in its objection to the percentage "triggering device":

> Implicit in the statute's 70% triggering device for these disclosures is an assumption, on the part of the Legislature, that when less than 70% of a charitable contribution is allocated to the 'program services' of a recipient charitable organization, the organization's 'efficiency' and its purported charitable purpose are both suspect, and it should therefore be required to disclose its financial inner-workings to prospective contributors. Based on the Supreme Court's pronouncements concerning similar legislative assumptions and the evidence in this record, we conclude that these premises upon which § 5012 is predicated are untenable and, as a result, the statute, in all of its applications, unnecessarily intrudes upon rights protected by the First Amendment. It is on this basis, discussed in more detail below, that the statute should be struck down as unconstitutional. (Citations omitted). 528 A.2d 458 at 461, Appendix to the Petition for Writ, App. 14.

The true issue presented by this case then, is not the question of disclosure but the question of regulation by use of percentages, which was clearly resolved in *Schaumburg* and *Munson*. If a percentage analysis of a charity's finances is not an accurate measure of fraud, as was un-

equivocally stated in *Munson*,[2] then it necessarily follows that the disclosure of "estimates" of those percentages is going to amount to the disclosure of irrelevant information, which may actually mislead the public and create more harm than good, not only for the charity but also for the prospective donor whose protection is ostensibly at issue.

As observed by Judge Britt in *National Federation of the Blind v. Riley*, 635 F.Supp. 256 (E.D.N.C. 1986), *aff'd*, 817 F.2d 102 (4th Cir. 1987) (*per curiam*), *prob. juris. noted*, 56 U.S.L.W. 3283 (U.S. October 19th, 1987) (No. 87-328), in addressing a similar North Carolina statute:

> For example, where the cost of the product or event being sold consumes 90% of the gross receipts, and the profits are split evenly between the charitable organization and the professional solicitator, section 8 requires a disclosure that the charitable organization is receiving only 5% of the gross receipts. Such a disclosure will put some charitable organizations into a hole from which they will not be able to recover. 635 F.Supp. 256 at 261.

II.

THERE IS NO CONFLICT OF DECISIONS SUFFICIENT TO WARRANT THIS COURT'S ATTENTION

This case finds it true origin in *Village of Schaumburg* and *Munson*. Since these decisions, the entire concept of

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2. The flaw in the statute is not simply that it includes within its sweep some impermissible applications, but that in all its applications it operates on a fundamentally mistaken premise that high solicitation costs are an accurate measure of fraud. 467 U.S. 947 at 967.

percentage analysis as a means of regulating charitable solicitations has been rejected: *National Federation of the Blind v. Riley, supra, Shannon v. Telco Communications, Inc.*, 824 F.2d 150 (1st Cir. 1987); *North Dakota v. WRG Enterprises, Inc.*, 314 N.W.2d 842 (N.D. 1982).

The State of Maine would refer the Court to *Heritage Publishing Company v. Fishman*, 634 F.Supp. 1489 (D. Minn. 1986) in support of its argument favoring percentage disclosure. A close reading of *Heritage*, a district court opinion, will reveal it to be not a decision on the merits, but a memorandum opinion relative to the issuance of a preliminary injunction. *Heritage* was later settled out of court and dismissed, and can hardly be reviewed as persuasive authority. Moreover, the court in *Heritage*, based upon *Schaumburg-Munson* analysis, found unconstitutional provisions of a Minnesota statute placing *percentage* limitations on a professional solicitor's fee.

There is no conflict of decisions on the issues *properly* presented by this case sufficient to warrant this Court's attention.

III.

THE QUESTION PRESENTED BY THIS CASE IS NOT IMPORTANT

The true issue presented by this case, percentage regulation of charitable solicitation, is not only well settled but the vehicle of the Maine litigation from which it rises presents so much factual evidence of the statute's patent invalidity that there is no possible saving construction, and therefore there is not an important question meriting this Court's attention.

On its face, the statute obviously requires the disclosure of at least three and as many as five separate percentage calculations. In reviewing the evidence propounded at trial, Judge Brody notes in his "Decision and Order":

> Here, the state imposes a very restrictive impediment on the exercise of free speech. The three-part disclosure requirement is in and of itself restrictive and calculation of the percentage figures imposes an insurmountable burden on many charitable organizations. Appendix to the Petition for Writ, App. 4.

Moreover, Judge Brody found, based upon the evidence, that the percentages themselves, once disclosed, are more likely to mislead than inform the potential donor:

> Testimony at trial supported the defendants' contention that an accurate calculation of the various percentage figures is extremely difficult in many situations and subject to a number of different methods and theories of calculation. As a result, an organization that makes a good faith attempt to comply with § 5012 could arrive at different percentage figures depending upon the accounting method utilized. The imprecision of the disclosure requirement renders it difficult to discern who is required to comply, when they are required to comply, and whether the law is being complied with correctly. Despite this difficulty presented by the statute, § 5012 carries with it a penalty for failure to disclose the percentages as well as for failure to disclose them correctly. After review of the evidence presented at trial, it appears clear that under all but the most ideal cir-

> cumstances, the required percentages are determined by estimates rather than solid figures. The testimony of defendants' expert witnesses fully supports the claim that in the absence of more precise guidelines, the allocation of expenses required by § 5012 is too complex and uncertain to rise beyond the level of a subjective and somewhat speculative determination. Appendix to the Petition for Writ, App. 4-5.

Based upon the record evidence, it is clear this case does not present an important question for this Court's consideration.

IV.

THE DECISION BELOW WAS CORRECT

As noted above, the issue presented by this case is not whether disclosure is a valid concept; that issue is well settled. The issue presented by this case is whether a state may constitutionally compel myriad *percentage* disclosures, once a threshold *percentage* of solicitation and management costs has been met. The Court must ask what presumption motivates the requirement of a 70% triggering device. The answer, as discerned by the Maine Supreme Judicial Court is:

> That when less than 70% of a charitable contribution is allocated to the 'program services' of a recipient charitable organization, the organization's 'efficiency' and its purported charitable purpose are both suspect, and it should therefore be required to disclose its financial inner-workings to prospective contributors. Appendix to the Petition for Writ, App. 14.

In light of the decisions in *Schaumburg, Munson, National Federation of the Blind, Shannon v. Telco Com-*

munications, and *North Dakota v. WRG, supra,* there is no question but that the opinion below is correct: percentages are not an accurate measure of fraud, nor apparently, the efficiency of a fund raising organization. As noted by the Maine Supreme Judicial Court in its opinion below:

> Evidence presented at trial reveals that many charities operate below the 70% threshold during the early years when they are engaged in building a substantial donor base. Their financial allocations to 'program services' may be low simply because they are just getting operations underway and attempting to fulfill a need that is unmet by other organizations. Charities or non-profit groups may also expend more on fund raising or management costs relative to program services because they serve unpopular causes. In either case, it cannot be said that the organization is either fraudulent or less 'efficient' in meeting charitable purposes than others with relatively low fund raising or management costs, and consequently higher percentage allocations to program services. Appendix to the Petition for Writ, App. 15.

The Court went on to say at footnote 7 to its opinion:

> The same may be said for organizations that sponsor very costly fund raising events where the percentage of gross contributions that they obtain for their 'program services' appear small, but in absolute terms the amount is quite substantial. Appendix to the Petition for Writ, App. 15, n.7.

Based upon the legal precedents guiding the Maine Supreme Judicial Court, and the record evidence before it, it is plain that the decision below was correct.

CONCLUSION

For the reasons set forth above, the State of Maine's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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November 11, 1987

CERTIFICATE OF SERVICE

I, Errol Copilevitz, a member of the Bar of the United States Supreme Court representing the Respondents in the above-captioned matter do hereby certify that three copies of the foregoing Response to Petition for Writ of Certiorari to the Maine Supreme Judicial Court have been served upon counsel of record for Petitioner by placing three copies of the same in the United States mail at Kansas City, Missouri, with postage pre-paid and addressed as follows:

Stephen L. Wessler
Assistant Attorney General
Chief, Consumer & Antitrust Division
State House Station 6
Augusta, Maine 04333

this 11th day of November, 1987.

ERROL COPILEVITZ
Counsel of Record